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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Re. Appellant: John Musacchia, Jr.
Serial No.: 09/174,868
Filed: October 19, 1998
For: ELEVATED GAME CALL WITH ATTACHMENT FEATURE
Examiner: U. Cegielnik
Group: 3712
Attorney: Nelson R. Capes
Attorney
Docket No.: 33057.1
Additional Fees: Charge to Deposit Account 02-3732

APPLICANT'S APPEAL BRIEF

BOX AF
Assistant Commissioner for Patents
Washington, D.C. 20231

Dear Sir:

Applicant by his attorney submits three copies of this Appeal Brief, pursuant to the Office Action mailed September 5, 2001 (Paper No. 16) and 37 C.F.R. § 1.192 in further of the Appeal, the notice of which was filed with the United States Patent and Trademark Office on January 7, 2002.

CERTIFICATE OF EXPRESS MAILING

I hereby certify that this document is being deposited with the United States Postal Service as Express Mail, Receipt No. EK362655077US in an envelope addressed to: BOX AF Assistant Commissioner for Patents, Washington, D.C. 20231 on the date indicated below.

By Nelson R. Capes
Date 3/8/02

I. REAL PARTY IN INTEREST

The real party in interest is Muzzy Products Corporation having a principal place of business at 110 Beasley Road, Cartersville, Georgia 30120. Muzzy Products Corporation is the current owner of the subject matter of U.S. Patent Application Serial No. 09/174,868 by an assignment from the inventor of the invention, John Musacchia, Jr., dated August 28, 1998 and recorded with the U.S. Patent and Trademark Office on Reel No. 9540 at Frame No. 0739.

II. RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences which will directly affect or will be directly affected by or have a bearing on the Board's decision in this appeal.

III. STATUS OF CLAIMS

The claims on appeal are claims 1, 3 to 5, 10 and 11. Claims 1 to 9 were originally filed in the present application. Claims 1 and 9 were amended in a Response dated February 2, 2000 to an Office Action mailed August 2, 1999. Claim 1 was again amended in a Response dated May 21, 2000 to an Office Action mailed March 2, 2000. Claim 2 was canceled and the limitations of claim 2 were incorporated into claim 1, claims 3 to 9 were amended and new claims 10 to 13 were added in a Preliminary Amendment in association with a Continued Prosecution Application filed January 31, 2000. Claims 1, 3 to 7, and 10 were amended and new claims 14 to 18 were added in a Response dated July 3, 2001 to an Office Action mailed April 3, 2001. In the Final Office Action mailed September 5, 2001, Claims 6 to 9 and 14 to 18 have been allowed, claims 12 and 13 have been objected to and deemed allowable if rewritten as independent claims incorporating all the limitations of claim 10, and claims 1, 3 to 5, 10 and 11 were finally rejected.

IV. STATUS OF AMENDMENTS

No amendments have been made after the final rejection dated September 5, 2001.

V. SUMMARY OF THE INVENTION

The present invention provides a game call that can be releasably secured around a hunter's thigh and used to call game using only one hand. Prior to the present invention, game calls typically required the use of two hands to emulate the calls of game. Therefore, a hunter would have to either put the call down or shift the call within the hunter's hand to properly aim and fire his gun. This exchange of game call for gun can frequently cause unwanted noise scaring the game before the hunter can get a shot off. The present invention generally includes a sound emanating surface that is elevated from the hunter's thigh by a leg or elevating device of a body attachment assembly. Thus, the sound produced by the present game call can escape to ambient.

As recited by the claims, the invention provides a one-piece game call (10) and elevating device or legs (14, 16), and a body attachment assembly (76). Game call (10) including a sound emanating surface (30) including apertures (70) for the escape of sounds created by game call (10). Elevating device or legs (14, 16) elevate sound emanating surface (30) from the leg or other surface of the hunter on which the invention is resting to provide an unencumbered path for the sound to escape game call (10) and reach ambient.

VI. ISSUES

- 1.) Whether claims 1, 3, 4, and 10 are anticipated under 35 U.S.C. § 102(b) by U.S. Patent No. 5,716,254 to Bowes.
- 2.) Whether or not claims 5 and 11 are non-obvious under 35 U.S.C. § 103(a) over U.S. Patent No. 5,716,254 to Bowes in view of the Official Notice of the Examiner.

VII. GROUPING OF CLAIMS

The rejected claims do not stand or fall together.

Claim 3 adds a further limitation to claim 1 of the elevating device being legs. This is believed to be separately patentable as the cited reference does not disclose this limitation.

Claim 4 adds a further limitation to claim 1 of the elevating device being legs and a platform supporting the game call. These are believed to be separately patentable from claim 1 as the cited reference does not disclose these limitations.

Claim 5 adds a further limitation to claim 4 of the platform being substantially rectangular and including front legs and rear legs extending from the bottom surface of the platform. These are believed to be separately patentable from claims 1 and 4 as the cited reference does not disclose these limitations.

Claims 6 to 9 add limitations to claim 1 that are not found in the cited reference as is evident from the Examiner allowing these claims in the Office Action mailed September 5, 2001.

Claim 10 includes a further limitation to claim 1 of the elevating device being legs. This is believed to be separately patentable as the cited reference does not disclose this limitation.

Claim 11 adds a further limitation to claim 10 of a flexible tether and a striker. These are believed to be separately patentable from claim 1 as the cited reference does not disclose these limitations.

Claims 12 and 13 add limitations to claim 10 that are not found in the cited reference as is evident from the Examiner only objecting these claims in the Office Action mailed September 5, 2001 and stating that these claims would be allowable if rewritten in independent form to include the limitations of the claims from which they depend.

Claims 14 to 18 add limitations to claim 1 that are not found in the cited reference as is evident from the Examiner allowing these claims in the Office Action mailed September 5, 2001.

Each of these claims should be individually considered in light of the cited art for the reason that the respective claim language differs sufficiently as to require independent consideration.

VIII. ARGUMENT

I. Claims 1, 3, 4, and 10 under 35 U.S.C. § 102(b) are not anticipated by Bowes.

The Examiner contends that Bowes discloses each of the elements presented in Appellant's Claims 1, 3, 4 and 10 and that, therefore, Bowes anticipates independent Appellant's claimed invention under 35 U.S.C. § 102(b). See Office Action mailed September 5, 2001, Page 2. The Examiner contends that Bowes, *inter alia*, discloses a game call having a scratch surface (42) separated from a sound emanating surface (43); the sound emanating surface having apertures (52), and an elevating device (40) elevating the sound emanating surface of said game call. Id. Appellant respectfully disagrees with the Examiner's interpretation of these elements as disclosed by Bowes. Further, whether or not the Board agrees with the Examiner's interpretation of Bowes, these elements do not anticipate the invention taught by Appellant.

Appellant submits that both independent claims 1 and 10 require an "elevating device" or a "leg," respectively, "providing an unencumbered path for the sound to escape the game call and reach ambient" which is not taught or suggested by Bowes.

Appellant respectfully submits that the Examiner misinterprets wall (40) as disclosed by Bowes. The Examiner interprets wall (40), which includes a skirt (44) and slots (52), as teaching slots (52) in "an elevating device (40)." Id. Contrary to the Examiner's position, the upper portion of wall (40) does not represent an "elevating device" as claimed by Appellant. The upper portion of wall (40) is shaped to form a sound chamber (43) that in combination with skirt (44) forms "a hat shape . . . to provide superior sound qualities, while also providing the striker plate (36) with a shape which can be securely held and supported." See Bowes at Column 4, lines 45 to 50; see also Bowes at Column 3, lines 53 to 57. Thus, the upper portion of wall (40) is configured to form sound chamber (43) and skirt (44) is the element that supports the hunting device of Bowes. Id. Accordingly, skirt (44), not the entirety of wall (40), is properly interpreted as corresponding to the "elevating device" and "legs" of Appellant's claims 1 and 10, respectively.

Considering Appellant's elevating device to Bowes' skirt (44), Bowes does not teach or suggest skirt (44) providing an unencumbered path for the sound to escape the game call and reach ambient as taught by Appellant and as required by claims 1 and 10.

The Examiner apparently misconstrues or fails to consider all of the limitations of Appellant's elevating device in claims 1 and 10 by using the premise that the elevating device of Bowes elevates the sound emanating surface from a hunter's leg as the basis for the Examiner's arguments. See Office Action mailed September 5, 2001, Page 2, paragraph 3.

As claimed by Appellant, claims 1 and 10 require an "elevating device" or a "leg," respectively, "providing an unencumbered path for the sound to escape the game call and reach ambient" which is not taught or suggested by Bowes. The Examiner argues that "Bowes clearly shows . . . [an] upper portion of skirt 44 providing an unencumbered path." See Office Action mailed September 5, 2001, Page 4, paragraph 5. To the contrary, skirt (44) provides no path for sound to escape. Skirt (44) as taught by Bowes is "an outwardly-flared" lower region of wall (40) which "provides increased surface area so as to reduce discomfort to the surface of the user's body." See Bowes at Column 3, lines 53 to 57. Slots (52) are not located on skirt (44) as defined by Bowes. Bowes explicitly states that "slots 52 in the wall 40 of striker plate 36 . . . [are] immediately above the flared skirt 44." Bowes at Column 3, lines 59 to 60. Slots (52) being positioned above skirt (44) do not provide an unencumbered path for the sound to escape the game call and reach ambient as required by claims 1 and 10. More specifically, Bowes' slots (52) are designed and configured for receiving a wrist band (38) to urge skirt (44) against the surface of a user's body not to promote the dissemination of sound. See Bowes at Column 4, lines 54 to 58. According to the disclosure of Bowes, a speaker (18) associated with striker (10) is provided to disseminate the sound, not slots (52), of the Bowes game call. See Bowes Column 2, line 66 to Column 3, line 29; Bowes Column 4, lines 57 and 58. Thus, Bowes could be construed to teach away from aspects of Appellant's invention. Accordingly, a rejection of claims 1, 3, 4 and 10 under 35 U.S.C. § 102(b) is inappropriate.

Alternatively, the Examiner's argument relies on the sound chamber (43) of Bowes being analogous to Appellant's sound emanating surface (30). If the Board accepts this analogy, the Board should consider wall (40), including skirt (44), as defining sound chamber (43). Interpreting Bowes as such, skirt (44) could not represent an "elevating device" or a "leg" as suggested by the Examiner because sound chamber

(43) would not be elevated above the hunter's arm at all. That is, sound chamber (44) would, at least in part, be defined by hunter's arm and, therefore, sound chamber (43) could not be considered as elevated by skirt (44) above the hunter's arm as the sound chamber (43) is disclosed and suggested by Bowes. Accordingly, if the Board considers the Examiner's analogy between Appellant's sound emanating surface and Bowes' sound chamber (43) proper, a rejection of independent claims 1 and 10 under 35 U.S.C. 102(b) is inappropriate.

II. Claims 5 and 11 under 35 U.S.C. § 103(a) are patentable over Bowes in view of the Official Notice of the Examiner.

The Examiner contends that Appellant's Claims 5 and 11 are obvious over Bowes in view of the Official Notice of the Examiner under 35 U.S.C. § 103(a). The Examiner takes Official Notice that "game calls with a rectangular platform and legs are well known devices for calling game." See Office Action mailed September 5, 2001 at Page 3, paragraph 2. However, as the Board understands, a rejection of a claim under 35 U.S.C. § 103(a) is improper if, when combined, the cited references do not teach all of limitations of the rejected claim.

Therefore, a rejection under 35 U.S.C. § 103(a) is inappropriate for the reasons stated above with regard to the Examiner's rejections under 35 U.S.C. § 102(b). Particularly, a rejection of claims 5 and 11 is inappropriate because Bowes does not teach or suggest an "elevating device" or a "leg" to "provide an unencumbered path for the sound to escape the game call and reach ambient" as required by claims 1 and 10 and from which claims 5 and 11 respectfully depend. Accordingly, the combination of Bowes with the Official Notice of the Examiner does not teach or suggest Appellant's claimed invention and the rejection under 35 U.S.C. § 103(a) is inapposite.

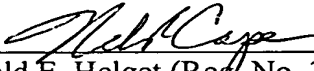
In view of the foregoing, Appellant asks the Board to overturn the Examiner's rejections and allow all claims

IX. APPENDIX

The appealed claims are presented in the attached appendix.

Respectfully submitted,

Dated: March 8, 2002

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APPENDIX

1. A hunting device for producing sound comprising:

(a) a one-piece game call and elevating device, wherein sound is produced, said game call having a scratch surface separated from a sound emanating surface, the sound emanating surface having apertures through which the sound in said game call escapes the game call; and

(b) a body attachment assembly, connected to said elevating device, designed to releasably attach the game call and elevating device to the body of a user of the hunting device;

the elevating device elevating the sound emanating surface of said game call such that the sound emanating surface is not in contact with a user when the body attachment assembly is attached to the body of a user, thereby providing an unencumbered path for the sound to escape the game call and reach ambient.

3. A hunting device according to Claim 1, wherein said elevating device comprises legs each having a first end and a second end, wherein said first ends of said legs are attached to said game call; and wherein said second ends of said legs are designed to contact the body of a user.

4. A hunting device according to Claim 1, wherein said elevating device comprises:

(a) a platform having a top surface and a bottom surface, said platform supporting said game call; and

(b) legs depending from said platform, each said leg having a first end and a second end, wherein said first end of each said leg is in contact with said platform; and wherein said second end of each said leg is designed to contact the body of a user.

10. A hunting device for a hunter, the hunting device for producing sounds and comprising:

(a) a one-piece game call with legs, the game call having a scratch surface and a sound emanating surface, the sound emanating surface having apertures through which sound in the game call can escape the game call, each leg extending from the sound emanating surface and terminating in a leg end; and

(b) a body attachment assembly designed to releasably secure each leg end to a hunter;

the sound emanating surface designed to be separated a distance from a hunter by the legs when said body attachment assembly is secured to a hunter, each leg end designed for supporting the hunting device on a hunter, and for providing an unencumbered path for the sounds to escape the game call.

11. The hunting device according to Claim 10, further comprising:

(a) a flexible tether having opposing ends; and

(b) a striker;

wherein said opposing ends of the tether are respectively attached to the striker and the game call.